

NO. 45465-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Guardianship of:

KEIKO DECKER,

An Incapacitated Person.

BRIEF OF THE DEPARTMENT

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I. INTRODUCTION

In this guardianship proceeding, Daniel Quick (Mr. Quick) seeks payment beyond the amount authorized by the superior court for his representation of Keiko Decker, an incapacitated person. The Department of Social and Health Services (Department) responds for the limited purpose of expressing its opinion that the authority he relies upon, *In re Guardianship of Beecher*, 130 Wn. App. 66, 121 P.3d 743 (2005), is distinguishable from this case. Alternatively, the Department argues that *Beecher* is contrary to the public policy in favor of the protection of vulnerable adults and this court should reach a different result. Further, the Department disputes any claim that the Department should bear Mr. Quick's costs on appeal.

II. ISSUE PRESENTED

1. Does *Beecher* strip the superior court of the authority to approve attorneys' fees for a court-appointed attorney for an alleged incapacitated person in a Guardianship proceeding where the alleged incapacitated person is ultimately adjudged to be incapacitated?
2. Alternatively, was *Beecher* incorrectly decided and harmful to the interests of Washington's vulnerable adults?
3. Should the Department be ordered to pay Mr. Quick's fees on appeal?

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III. COUNTERSTATEMENT OF THE CASE

A. Statutory History

The Legislature enacted the Abuse of Vulnerable Adults Act, Chapter 74.34 RCW, in 1995 “to provide protection and legal remedies to vulnerable adults living in the community but dependent on others for their care.” *Cummings v. Guardianship Servs. of Seattle*, 128 Wn. App. 742, 749, 110 P.3d 796 (2005). In doing so, it recognized that vulnerable adults are in particular need of protection from abuse, neglect, abandonment, or exploitation. *Kraft v. Dep’t of Social and Health Serv.s*, 145 Wn. App. 708, 717, 187 P.3d 798 (2008). Pursuant to the act, Adult Protective Services (APS), a program within the Department of Social and Health Services (Department), has the authority to pursue protective services on behalf of vulnerable adults. RCW 74.34.063(2); 74.34.067(6); 74.34.150. Specifically, APS has the authority to petition for the appointment of a guardian for a vulnerable adult if APS determines the guardianship is necessary to protect the safety of the vulnerable adult. RCW 74.34.067(5).

In a guardianship proceeding, the role of a petitioner, such as APS, is limited. *In re the Guardianship of Matthews*, 156 Wn. App. 201, 209, 232 P.3d 1140 (2010). The petitioner’s role is to alert the trial court of the potential need and reasons for a guardianship of an incapacitated

person and to respond to any inquiries from the court. *Id.* at 209-10. The real party in interest in a guardianship proceeding is the alleged incapacitated person and it is the trial court's duty to ensure that his or her interests are protected. *Id.* at 210, citing *In re Guardianship of Gaddis*, 12 Wn.2d 114, 123, 120 P.2d 849 (1942); *In re Guardianship of McKean*, 136 Wn. App. 906, 913, 151 P.3d 223 (2007). Although APS may petition the court, it is the court that ultimately decides to appoint a guardian. RCW 11.88.010(1). The court has power to appoint a guardian as it finds necessary for the protection and assistance of the incapacitated person. In doing so, the legislature requires that it restrict the autonomy of such incapacitated person to the minimum extent necessary. RCW 11.88.005; RCW 11.88.010(2). The court is the "superior guardian" of the incapacitated person which means the court is ultimately charged with making decisions for the best interest of the incapacitated person. *Seattle-First Nat'l Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977); RCW 11.92.010.

B. Mrs. Decker's Adult Protective Services History

Keiko Decker is an elderly woman who has lived alone in her own home since the death of her husband in October 2009. CP at 18 and 145. In November 2010, APS received reports that Mrs. Decker was neglecting herself. CP at 18. Specifically, it received allegations that Mrs. Decker

was becoming increasingly paranoid and had recently spent over \$60,000 on faulty landscaping. CP at 18. APS began an investigation into the allegations. CP at 18. Mrs. Decker's medical records indicated that she was diagnosed with dementia and she was experiencing symptoms of paranoia that impeded her ability to manage her finances and other affairs. CP at 19. Further, Mrs. Decker had never before handled her finances because her husband exclusively handled them before he died. CP at 20, CP at 40. Mrs. Decker informed APS that she refused to take the medications prescribed by her physician because she believed someone was putting drugs in her food to impede her memory. CP at 19. Mrs. Decker also believed she was being spied upon through her appliances, light fixtures, and outlets. CP at 19. Further, Mrs. Decker reported to APS that she needed an attorney to protect her life. CP at 19. During APS's visits, Mrs. Decker had very little food in the home and had lost over ten pounds since her husband died.¹ CP at 19. APS found that Mrs. Decker did not have any family in the United States or any person able to provide her with assistance. CP at 20. As a result of its investigation, APS made a finding that Mrs. Decker was neglecting herself. CP at 20. A finding of self-neglect might be made in addition to protective measures APS offers to a vulnerable adult, including a guardianship proceeding.

¹ This amount of weight loss is significant because Mrs. Decker only weighed approximately 92 pounds. CP at 172.

C. Procedural History

As a result of the allegations concerning Mrs. Decker and information gathered during its investigation which led to the finding of self-neglect, the Department determined that Mrs. Decker was at risk of further self-neglect or financial exploitation and that she needed a guardian. CP at 20. The Department filed a petition for guardianship for Mrs. Decker pursuant to Chapter 11.88 RCW. CP at 13. The commissioner appointed Stephen DeVoght as the *guardian ad litem* (GAL) for Mrs. Decker.² CP at 22. Mrs. Decker objected to the guardianship and Mr. DeVoght sought to have counsel appointed for her by the commissioner. CP at 27.

On June 22, 2011, the commissioner appointed Mr. Quick to represent Mrs. Decker for up to ten hours. CP at 32. Mr. Quick had no previous relationship with Mrs. Decker. CP at 30. In his statement of qualifications, Mr. Quick did not list any prior experience representing incapacitated persons for purposes of a guardianship proceeding. CP at 30. On July 29, 2011, approximately a month after his original appointment, Mr. Quick asked the commissioner to approve payment from Mrs. Decker's estate for another forty hours of representation. CP at 422.

² In Pierce County, guardianship matters are heard on the commissioner's calendar except for annual periodic reviews which are heard by the superior court. PCLR 7(b)(1)(B); PCLSPR 98.20(b).

After the Department and the GAL agreed, the commissioner entered Mr. Quick's proposed order that stated: "Independent legal counsel shall be paid at private expense, with fees for representation subject to the commissioner's approval pursuant to RCW 11.92.180 and SPR 98.12.³ Legal counsel for Keiko Decker shall bill at the rate of \$250 per hour, and shall have [a] further forty (40) hours of authority to represent Mrs. Decker." CP at 423.

Simultaneously, the GAL conducted an investigation to determine if Mrs. Decker was incapacitated and whether to recommend the appointment of a guardian for her pursuant to RCW 11.88.090. Before the GAL submitted his final report, Mr. Quick sent numerous discovery requests to the Department and suggested that depositions of Department personnel be scheduled. CP at 298. The Department sent the APS investigative file, over 500 pages, to Mr. Quick but suggested that additional discovery be stayed pending the submission of the GAL's report. CP at 298-99. Mr. Quick never issued a subpoena to depose any witnesses nor did he file a motion to compel additional discovery. *See* CP at 277, 288, 298, and 300.

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³ SPR 98.12W is a special proceedings rule that requires a personal representative who applies for compensation to give notice to all interested parties of the amount of compensation claimed.

The GAL obtained a medical report from Dr. Stegman, M.D. dated June 16, 2011. *See* Sealed Personal Health Records filed 5/9/12 at 4; *See also* CP at 3 and 8. In the report, Dr. Stegman diagnosed Mrs. Decker with Alzheimer's disease and recommended that a guardian be appointed to assist Mrs. Decker in the management of her finances. *See* Sealed Personal Health Records filed 5/9/12 at 3; *see also* CP at 8.

In August 2011, Mr. Quick filed several documents related to his request for ongoing payment. CP at 428-45. Specifically, he filed a petition for approval of association of counsel on the matter, approval of the fee agreement of Daniel Quick, approval of the fee agreement of Sheila Ridgway, and approval of reasonable time spent and costs incurred for trial. CP at 428. He also attached an unsigned fee agreement. CP at 442-43. The commissioner reserved Mr. Quick's petition for approval of his fee agreement and it was never subsequently approved. CP at 453.

On December 20, 2011, Mr. Quick helped Mrs. Decker execute a Durable Power of Attorney instrument naming Mr. Quick as her attorney-in-fact. CP at 469-74.

On February 10, 2012, licensed psychologist Dr. Edwin Hill, Ph.D., conducted a neuropsychological evaluation of Mrs. Decker. CP at 169-82. Dr. Hill determined that Mrs. Decker suffered from signs of

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cognitive impairment and had significantly questionable judgment with respect to the management of significant health problems. CP at 179.

On May 9, 2012, the GAL submitted his report. CP at 38. He recommended that a Certified Professional Guardian be appointed as the limited guardian of the person and estate for Mrs. Decker. CP at 40. The GAL also opined that, “there may be a reasonable alternative to guardianship, but I believe it would need to have substantial court oversight and would need to ensure there is proper legal authority that would be recognized by the Social Security Administration and the Department of Veteran’s Affairs for financial purposes.”⁴ CP at 39.

In light of a possible less restrictive alternative, on June 8, 2012, the Department filed a motion to dismiss the guardianship in lieu of the Durable Power of Attorney. CP at 44. But, the Department also raised concern that the Durable Power of Attorney naming Mrs. Decker’s court-appointed attorney as her attorney-in-fact may constitute a conflict of interest or at least create the appearance of a conflict of interest. CP at 47. The commissioner denied the motion because it was not satisfied that Mrs. Decker had the requisite capacity to execute the Durable Power of Attorney. It ordered the GAL to obtain a third medical opinion in order to

⁴ The GAL noted that alternatives to guardianship, such as powers of attorney, are often not recognized by the Social Security Administration or the Department of Veteran’s Affairs. CP at 40.

determine if the Durable Power of Attorney was a viable less restrictive alternative to guardianship. CP at 309, 310, 317, and 496.

On August 15, 2012, Mr. Quick filed a motion to dismiss the guardianship proceedings on behalf of Mrs. Decker. CP at 75. The commissioner denied the motion. CP at 82.

On April 19, 2013, the GAL filed a supplemental report naming Maurice Laufer as the proposed limited guardian of the person and estate for Mrs. Decker. CP at 498. Mrs. Decker agreed to the appointment of Mr. Laufer as the limited guardian of her person and estate. CP at 97 and 190.

On May 7, 2013, the commissioner adjudicated Mrs. Decker to be incapacitated and appointed Maurice Laufer as the limited guardian for her person and estate. CP at 84. The commissioner entered findings of fact and conclusions of law that Mrs. Decker was incapacitated based upon the written report of the GAL, the medical report of Dr. Stegman, the psychological report of Dr. Hill, the testimony of witnesses, the remarks of counsel, and all the documents in the court file. CP at 85. The commissioner specifically found “Mrs. Decker executed a power of attorney instrument that is not in effect due to questions of Mrs. Decker’s capacity at the time she executed this document. Mrs. Decker does not have the current capacity to execute a power of attorney instrument at this

time.” CP at 86. The commissioner lists the powers of the Guardian as those granted pursuant to chapter 11.92 RCW specifically including “the management of the financial affairs of the incapacitated person.” CP at 88.

Mr. Quick did not file a fee declaration preceding the hearing to appoint Mr. Laufer as guardian. The commissioner reserved the issue of Mr. Quick’s fees until the 90-day guardianship hearing.⁵ CP at 95.

Mr. Quick filed a Petition to Approve Attorney’s Fees on July 30, 2013. CP at 145. In the Petition, Mr. Quick requested fees in excess of the 50 hours approved by the commissioner:

in the amount of \$118,110.65 for the period of June 22, 2011 – July 30, 2013, are reasonable and necessary and should be approved. An outstanding additional amount of \$17,137.50 shall also be approved and paid immediately by the guardian from the assets of the guardianship estate. In the case that Daniel Quick’s fees and costs are not approved in full, any time previously invoiced as ‘no charge’ will cease to be gratis and such fees shall be applied against any reduction ordered.

CP at 152-53. Apparently, Mr. Quick had already charged, and Mrs. Decker had already paid, \$100,973.15 to Mr. Quick for his services. Along with the request, Mr. Quick attached a private fee agreement to the Petition to Approve Attorney’s fees. CP at 158. Mr. Quick did not

⁵ The guardian is required to file an inventory and personal care plan for the incapacitated person within 90 days of appointment as guardian. RCW 11.92.040(1); 11.92.043(1).

previously notify the court or other parties that a private fee agreement was executed. Rather, the commissioner previously approved only 50 total hours of representation, billed at \$250 per hour. *See* CP at 32, CP at 422-23. Mr. Quick's fee declaration includes approximately 568 billed hours. *See* CP at 194-245.

The commissioner denied Mr. Quick's petition for approval of fees but did approve fees in the amount of \$30,000. CP at 331. The commissioner noted that Mr. Quick was authorized approximately \$12,500 (50 hours at \$250 per hour) but he billed and received more than \$100,000 in excess of the amount authorized by the court. CP at 367. Mr. Quick was ordered to repay the amount he was already paid in excess of \$30,000 to the guardian within six months. CP at 331. Mr. Quick filed a motion to revise arguing that the commissioner's reduction of his fees was "arbitrary and capricious." CP at 334-35. This motion was denied by the superior court on revision. CP at 381. Mr. Quick did not repay the guardian any of the fees in excess of \$30,000. The Guardian was subsequently ordered by the commissioner to further defend against the appeal taken by Mr. Quick. CP at 417.

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IV. ARGUMENT

A. Standard Of Review

A commissioner's decision not revised by the superior court becomes the decision of the superior court. *In re Parentage of Hilborn*, 114 Wn. App. 275, 278, 58 P.3d 905, 907 (2002). This Court must find manifest abuse of discretion to reverse an attorney fee award. *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). The superior court abuses its discretion when it exercises its discretion on untenable grounds or for untenable reasons. *Chuong*, 159 Wn.2d at 538, *citing State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). And, this Court reviews issues of statutory interpretation *de novo*. *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004).

B. The Superior Court Has the Authority To Review And Approve The Fees Of The Court-Appointed Attorney For An Incapacitated Person

1. The Fees Of An Attorney Appointed By The Superior Court For An Alleged Incapacitated Person Are Subject To Court Approval When The Alleged Incapacitated Person Is Adjudicated To Be Incapacitated

The courts only "have the power to appoint guardians for the persons and/or estates of *incapacitated* persons." RCW 11.88.010(1) (emphasis added). A determination of incapacity is a legal decision made

either by the court or a jury. RCW 11.88.010(1)(c); 11.88.045(3); 11.88.095(1)(a). And, a guardianship cannot be entered into based upon the agreement of the parties. RCW 11.88.095. Rather, the court's determination must be "based upon findings as to the capacities, condition, and needs of the alleged incapacitated person." RCW 11.88.095(1).

In accordance with RCW 11.88.095, the commissioner entered detailed findings of fact and conclusions of law on the issue of Mrs. Decker's capacity based on "the written report of the Guardian ad Litem and the Medical report of Dr. Stegman, the psychological report of Dr. Hill, the testimony of witnesses, remarks of counsel, and the documents filed herein." CP at 85. Thus, Mrs. Decker was determined to be incapacitated on May 7, 2013, when the commissioner made a finding as to her capacity and appointed a guardian for her. CP at 84 and 88.

Mr. Quick mistakenly relies on *Beecher* to argue the court has no authority to review his fees. This is misplaced because the *Beecher* court specifically states that attorneys' fees for alleged incapacitated persons are subject to court approval when the alleged incapacitated person is subsequently adjudged to be incapacitated. *Beecher* at 71.

In *Beecher*, Loretta Beecher, the alleged incapacitated person, hired attorney Watson B. Blair to represent her in guardianship proceedings initiated by her step-son. *Id.* at 68-69. Ms. Beecher had previously

retained Mr. Blair for other legal representation in the past. *Id.* at 68. The petitioner and the GAL brought a motion disputing Mr. Blair's fees. *Id.* at 68. The trial court cut Ms. Beecher's attorney's fees in half. *Id.* at 68. A guardian was never appointed for Ms. Beecher, rather, the guardianship was dismissed. *Id.* at 70. The *Beecher* court held that the superior court did not have the authority to review Mr. Blair's fees because Ms. Beecher was never adjudicated to be incapacitated. *Id.* at 68. But, the *Beecher* court held: "a court's statutory review of an [alleged incapacitated person]'s attorney's fees must also be limited to situations where there has been a determination that the [alleged incapacitated person] is in fact incapacitated." *Id.* at 72.

Mr. Quick strains logic by arguing that *Beecher* controls the facts at hand by arguing that Mrs. Decker was not adjudicated to be incapacitated. Mr. Quick proposes that Mrs. Decker was never adjudicated to be incapacitated because she "acquiesced" to a limited guardianship and there was never a contested hearing. *See* Daniel Quick's Opening Brief (Opening Br.) at 30. This is in error.

To "adjudge" is defined as "1. To rule upon judicially. 2. To deem or pronounce to be. 3. To award judicially." *Black's Law Dictionary* 16 (3rd Pocket ed. 2006). The order appointing a limited guardian for Mrs. Decker was an "adjudication" pursuant to both the guardianship statute

and based on the common meaning of the word. Mrs. Decker was adjudicated to be incapacitated when the commissioner entered the order appointing a guardian for her. CP at 84. Because Mrs. Decker was determined, or “adjudged,” to be an incapacitated person, the court had the authority to approve Mr. Quick’s fees for representation of Mrs. Decker pursuant to both RCW 11.88.045 and the *Beecher* decision. The court properly approved \$30,000 in compensation. CP at 381.

Beecher is further distinguishable because Mrs. Decker did not choose her attorney based on a history of representation as was the case in *Beecher*. *Beecher* at 68. Unlike *Beecher*, Mr. Quick was appointed by the commissioner at the nomination of the GAL. CP at 27; *see also* Opening Br. at 7. At the time the commissioner appointed Mr. Quick, there was already evidence that Mrs. Decker could not manage her finances and was prone to financial exploitation – including an allegation that she paid over \$60,000 in faulty landscaping. CP at 18. The commissioner expressly found that Mrs. Decker did not have the capacity to enter into a Durable Power of Attorney instrument appointing Mr. Quick as her attorney-in-fact. CP at 86. It is unlikely that Mrs. Decker would have had the ability to hire and appropriately supervise an attorney herself. The commissioner, in exercising its broad equitable powers in guardianship matters, sought to assist Mrs. Decker by appointing an attorney for her. As a reasonable

precaution in appointing Mr. Quick, the commissioner required him to seek approval from the court for any additional fees he sought to charge Mrs. Decker. CP at 32, CP at 422. If courts cannot take this last step, then courts will be left with the choice of leaving alleged incapacitated persons unrepresented or creating attorney-client relationships that could result in predatory attorney's fees. Mr. Quick's relationship with Mrs. Decker was court-created, and therefore, was subject to reasonable supervision by the court. *Beecher* is not to the contrary.

2. Alternatively, *Beecher* Was Incorrectly Decided And It Is Harmful To Vulnerable Adults

If the Court determines that *Beecher* controls on attorneys' fees in this case, the Department respectfully submits that this Court should reach a different decision because *Beecher* was incorrectly and harmfully decided. See *Marley v. Dep't of Labor and Industries*, 72 Wn. App. 326, 330, 864 P.2d 960 (1993) (Division One recognizing that it is not bound by Division Three decision).

The *Beecher* court's decision to disregard the plain meaning of RCW 11.88.045 was incorrect. Further, the result of the *Beecher* decision is harmful because it allows attorneys free reign to charge predatory fees to the most vulnerable people in Washington State. Instead, public policy favors court oversight of attorneys' fees for alleged incapacitated persons.

**a. RCW 11.88.045 Requires The Court To Review
And Approve Attorneys' Fees For Alleged
Incapacitated Persons In Guardianship
Proceedings**

The *Beecher* court failed to give effect to the plain meaning of RCW 11.88.045 which specifically contemplates that attorneys, even for *alleged* incapacitated persons, are bound by the oversight of the court. RCW 11.88.045. The Legislature, by including specific language relating to attorneys' fees for *alleged incapacitated persons*, intended the court approval requirement listed in RCW 11.92.180 to also apply to attorneys' fees for *alleged incapacitated persons* as provided in RCW 11.88.045.

As mentioned above, the Court reviews issues of statutory interpretation *de novo*. The Court's primary duty in construing a statute is to ascertain and carry out the legislature's intent. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related statutory provisions, and the statutory scheme as a whole. *Id.* If the statute's meaning is unambiguous, the inquiry is at an end. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The Court is obligated to consider the statute as a whole and its interpretation must not create an absurd result. *Strain v. W. Travel, Inc.*,

117 Wn. App. 251, 254, 70 P.3d 158 (2003). And, “[s]tatutes should be construed so that no language is superfluous.” *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 860, 827 P.2d 1000 (1992).

RCW 11.88.045 contemplates the appointment of attorneys to represent alleged incapacitated persons or incapacitated persons in guardianship proceedings. RCW 11.88.045 provides in part:

(1)(a) Alleged incapacitated individuals shall have the right to be represented by willing counsel of their choosing at any stage in guardianship proceedings When, in the opinion of the court, the rights and interests of an alleged or adjudicated incapacitated person cannot otherwise be adequately protected and represented, the court on its own motion shall appoint an attorney at any time to represent such person.

(2) During the pendency of the guardianship, any attorney purporting to represent a person alleged or adjudicated to be incapacitated shall petition to be appointed to represent the incapacitated or alleged incapacitated person. *Fees for representation described in this section shall be subject to approval by the court pursuant to the provisions of RCW 11.92.180.* (emphasis added).

The plain language of RCW 11.88.045(2) unambiguously states that *alleged* incapacitated persons may be represented by attorneys who must first petition to be appointed to represent the incapacitated or alleged incapacitated person, and that fees for such representation are subject to court approval pursuant to RCW 11.92.180. RCW 11.92.180 states in relevant part:

A guardian or limited guardian shall be allowed such compensation for his or her services as guardian or limited guardian *as the court shall deem just and reasonable*. Guardians and limited guardians shall not be compensated at county or state expense. Additional compensation may be allowed for other administrative costs, including services of an attorney and for other services not provided by the guardian or limited guardian. . . . *In all cases, compensation of the guardian or limited guardian and his or her expenses including attorney's fees shall be fixed by the court* and may be allowed at any annual or final accounting; but at any time during the administration of the estate, the guardian or limited guardian or his or her attorney may apply to the court for an allowance upon the compensation or necessary expenses of the guardian or limited guardian and for attorney's fees for services already performed. If the court finds that the guardian or limited guardian has failed to discharge his or her duties as such in any respect, it may deny the guardian any compensation whatsoever or may reduce the compensation which would otherwise be allowed. (emphasis added).

The *Beecher* court disregards the plain language regarding representation of “alleged incapacitated person[s]” by overly restricting RCW 11.92.180 to situations where the alleged incapacitated person is deemed to be incapacitated thereby rendering the language in RCW 11.88.045 superfluous. The *Beecher* court read RCW 11.92.180 to apply only to incapacitated persons – which is correct – but then read that requirement into RCW 11.88.045. The *Beecher* court explained its reading of the statutes this way:

[A] court could not possibly review a guardian's fees before adjudication because no guardian is or can be appointed until after the court has ruled on the petition.

Since RCW 11.88.045 incorporates the guardian fee review provisions, a court's statutory review of an [alleged incapacitated person's] attorney's fees must also be limited to situations where there has been a determination that [the alleged incapacitated person] is in fact incapacitated.

Beecher at 72. This is in error. The plain language of RCW 11.88.045 requires the court to review and approve attorneys' fees for alleged incapacitated persons *in the same way* that it does for guardians and limited guardians for incapacitated persons under RCW 11.92.180.

The *Beecher* court's logic is also flawed. The court was right that guardians and limited guardians can only be appointed for incapacitated persons – they also do all of their work for incapacitated persons. But, it also follows that attorneys appointed to defend against a guardianship petition can only be appointed for *alleged* incapacitated persons and they do their work for the *alleged* incapacitated person. After the adjudication of incapacity, there is nothing for the attorney to defend against. The *Beecher* court misread RCW 11.88.045, resulting in a statutory interpretation that does not make sense.

Beecher was thus incorrectly decided and this Court should not follow it.

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b. Alleged Incapacitated Persons Need The Court's Protection

Guardianship proceedings sometimes end in a “less restrictive alternative” without the appointment of a guardian or an adjudication of incapacity. *See* RCW 11.88.010(2); 11.88.090(5)(e). The fact that these proceedings stop short of adjudicated incapacity, however, does not mean that the alleged incapacitated person is able to look after his or her rights or supervise his or her attorneys without court intervention. Whether or not a finding of incapacity is made, the award of attorneys’ fees in a guardianship proceeding should be subject to court supervision. The interests of the incapacitated person or alleged incapacitated person are the primary focus of the guardianship court. And, even if a guardian is not ultimately appointed for an individual, court oversight of attorneys’ fees for these vulnerable individuals allows for the necessary protection of their estates.

The purpose of the guardianship statute is to benefit and protect the life and property of the alleged incompetent. *In re the Guardianship of Atkins*, 57 Wn. App. 771, 777, 190 P.2d 210 (1990). Guardianships are unique matters because the court bears the responsibility for protecting the person and estate of an incapacitated person. *In re Guardianship of Hallauer*, 44 Wn. App. 795, 797, 723 P.2d 1161 (1986). And the courts

have long held broad discretion in the administration of guardianship proceedings so as to protect the interests of the incapacitated person. *See* RCW 11.92.010; 11.96A.020.

But, this must be balanced with the intent of the Legislature “to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person.” RCW 11.88.005. Therefore, it is incumbent upon the court, in making a determination of capacity, to first evaluate whether there are less restrictive alternatives that could protect the alleged incapacitated person in the least restrictive manner. *See* RCW 11.88.010(2); 11.88.090(5)(e).

As a result, individuals who may otherwise meet the definition of incapacity as defined by RCW 11.88.010 are sometimes not adjudicated to be incapacitated in lieu of a less restrictive alternative. Such alternatives may include the use of a payee, attorney in fact, or other alternative decision-making mechanism. In these cases, the individual may be no less vulnerable or susceptible to predatory attorneys’ fees than a person adjudicated to be incapacitated. Court oversight of attorneys’ fees is, therefore, consistent with the purpose of the guardianship statute to protect the life and estate of even the *alleged* incapacitated person.

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C. Fees For The Court-Appointed Attorney For The Incapacitated Person Are Not Properly Assessed Against The Petitioner

RCW 11.96A.150(1) allows for a discretionary award of attorney fees to any party, against any part or against the estate in such matter as the court determines to be equitable. Mr. Quick asserts in the conclusion of his closing brief that “Mr. Quick’s fees be paid by the Department or the Limited Guardian from the time they had notice from Mr. Quick of the settled law governing the appeal.” Opening Br. at 33. Mr. Quick cites no legal authority for the proposition that the Department can be required to pay his attorney’s fees on appeal. The one case he does cite involved an award of fees pursuant to a rule 11 sanctions motion and, therefore, is not relevant here. Opening Br. at 32, citing *MacDonald v. Korum Ford*, 80 Wn. App. 877, 912 P.2d 1052 (1996).

Not only is there no legal authority to assess fees against the Department, it is also not equitable to do so because such a ruling would be contrary to public policy. Mr. Quick’s assertion that this matter is governed by settled law is wrong. And, even if Mr. Quick is correct, his assertion that the Department received notice of this law is incorrect.

APS is the state agency designated to receive reports of abuse, neglect, and exploitation against vulnerable adults and *may* also provide protective services to them. RCW 74.34.067(2). APS may request a

guardianship but does not have a duty to provide for or seek guardianship for vulnerable adults. If the Department bears the costs of court-appointed attorneys' fees on appeal, it would cast a chilling effect upon the Department's willingness to petition for the appointment of guardians for vulnerable adults who are at significant risk of harm. It would essentially punish the party that simply alerted the court to the probable incapacity of the alleged incapacitated person in accordance with *Matthews*. *Matthews*, 156 Wn. App. at 209.

Further, the superior court ordered Mr. Quick's fees be reduced. CP at 331. The superior court has the clear responsibility to ensure the maintenance and continuity of a guardianship it has authorized. RCW 11.92.010; *see also In re Guardianship of Gaddis*, 12 Wn.2d 114, 123, 120 P.2d 849 (1942) ("The guardian is in effect an agent of the court, and through him the court seeks to protect the ward's interest. It would follow, therefore that the court which appoints a guardian is required by statute to continue supervisory control of the ward's estate throughout its administration.") In this case, the commissioner has directed the Guardian to defend against fees sought by Mr. Quick in excess of the court-approved amount. CP at 417. There is no factual basis to assign fees on appeal to the Department who plays only a tangential role in the guardianship matter that is properly supervised by the court itself.

Mr. Quick argues that the Department should be responsible for his fees on appeal because these matters are governed by settled law and because the Department received notice of such settled law. This is incorrect. As argued above, Mr. Quick's reliance on the *Beecher* decision is misplaced because Mrs. Decker has been adjudicated to be incapacitated. As such, the *Beecher* decision grants the court the authority to review attorneys' fees for the incapacitated person.

And even if Mr. Quick's reliance on *Beecher* is not in error, Mr. Quick never provided notice to the Department about these cases. Mr. Quick appears to conflate the guardian and the Department by mistakenly referring to "the respondents" when describing the petition for instruction filed by the Guardian. Opening Br. at 31; CP at 397-99. Mr. Quick provides no support for the assertion that the *Department* received written notice that the issues to be raised on appeal are settled by *Beecher* and *Mahler*.⁶ Opening Br. at 32. In fact, the Department received no such notice. And, the Department did not dispute the reasonableness of Mr. Quick's fees at the superior court. Rather, the Department provided a response below "to clarify the factual mischaracterizations contained in Mr. Quick's Petition to Approve Attorney's fees." CP at 267.

⁶ The Department does not separately address the arguments on *Mahler* (*In re the Guardianship of Mahler*, 135 Wn.2d 398, 957 P.2d 632 (1998)) but agrees with the Guardian's position.

Assignment of Mr. Quick's fees on appeal to the Department is contrary to public policy; is not governed by settled law; and even if it were, the Department did not receive notice of such settled law. Therefore, the Department requests that Mr. Quick bear the expense of his own attorney's fees on appeal.

V. CONCLUSION

Because Mrs. Decker was adjudicated to be incapacitated, *Beecher* does not apply and the superior court's partial approval of Mr. Quick's fees was not an abuse of discretion. And, to the extent *Beecher* does apply, the Department respectfully asks this Court not to rely on *Beecher* because it was incorrectly decided and is contrary to the public policy favoring the protection of vulnerable adults. Lastly, assessing Mr. Quick's fees on appeal against the Department would be unjust and improper.

RESPECTFULLY SUBMITTED this 19th day of June, 2013.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 19th day of June, 2014 at Olympia, WA.


DAWN WALKER

WASHINGTON STATE ATTORNEY GENERAL

June 19, 2014 - 12:58 PM

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